No. 84-1532

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In The
Supreme Court of the United States
October Term, 1984

STATE OF NEVADA, et al.,

Petitioners,

v.

VIRGINIA M. OLIVER,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly determined that it had no jurisdiction over the attempted appeal?

II. Assuming arguendo that the petitioners' Eleventh Amendment contention is cognizable at this juncture, whether there are special and important reasons to grant the petition in order to consider the merits of such contention?

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STATEMENT OF CASE

The State of Nevada (hereinafter "the petitioner", "the State", or "the defendant") filed its motion for summary judgment in the District Court on May 26, 1983. Appendix, p.1a. The motion papers contained absolutely no mention of any claim based upon the Eleventh Amendment.

Motion practice in the United States District Court for the District of Nevada is governed by Rule 16 of that Court's Rules of Practice. Subsection (b) of the rule requires that "the moving party shall serve and file with the motion papers a memorandum setting forth the points and authorities relied upon in support of the motion." (emphasis added) Subsection (e) provides that the failure to file the required memorandum "shall constitute a consent to the denial of the motion." Appendix, p. 62a.

On June 29, 1983, the petitioner

filed its only other memorandum authorized by Rule 16; this was the petitioner's reply in support of its motion for summary judgment. Appendix, p. 12a. Again, this memorandum made no mention of any claim of Eleventh Amendment immunity.

On September 13, 1983, the District Court ordered the filing of supplemental memoranda of points and authorities, addressing the issue of equitable tolling as this issue pertained to the petitioner's motion for summary judgment. Appendix, p. 59a. Both the respondent (hereinafter "the plaintiff") and the defendant were ordered to file their supplemental memoranda within twenty days of the Court's order. In its order, the District Court afforded each party the further opportunity to reply to the opposing party's supplemental memorandum; this reply was to be filed within fifteen days of the date of service of the opposing party's

supplemental memorandum.

The petitioner filed its supplemental memorandum of points and authorities on October 3, 1983; the State made no argument based upon the Eleventh Amendment. Appendix, p. 23a. Its sole contention was that the doctrine of equitable tolling was generally inapplicable to Title VII claims, a contention which has of course been rejected by this Court. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982).

On October 19, 1983, the petitioner filed its final authorized memorandum of points and authorities. Appendix, p. 33a. Once more, the State made no contention that the Eleventh Amendment prohibits utilization of the equitable tolling doctrine against a State defendant in a Title VII case.

On December 13, 1983, the District Court entered its order setting a hearing

on the motion for summary judgment. Appendix p.39a. The hearing was set for February 13, 1984. The Court deemed the hearing to be necessary to determine whether the plaintiff's time within which to file her claim with the EEOC should be equitably tolled, that is, "whether plaintiff was justified in pursuing her sex discrimination claim with DOI." Appendix, p. 43a.

On January 19, 1984, the District Court entered a minute order rescheduling the hearing to March 5, 1984. Appendix p. 46a.

The petitioner's first mention of its Eleventh Amendment claim is contained in an additional and unauthorized "supplemental memorandum" filed March 2, 1984, only two days before the March 5, 1984 hearing. Appendix p. 48a.

ARGUMENT SUMMARY

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT IT HAD NO JURISDICTION OVER THE ATTEMPTED APPEAL.

The only basis for appellate jurisdiction urged by the petitioner is the "collateral order doctrine" enunciated by this Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) and its progeny. To come within the "small class" of cases in which Cohen appellate jurisdiction exists, a decision must meet three requirements. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). The first requirement is that the decision conclusively determine the disputed question prorfered for review.

The District Court's order denying summary judgment is silent as to the petitioner's Eleventh Amendment claim. Petition, pp 1a-8a. This conspicuous silence is unremarkable in that the petitoner failed to properly raise its Eleventh

Amendment in the District Court proceedings pertaining to the motion for summary judgment. Local Rule 16. Appendix, p. 62a. Because the District Court never determined the petitioner's Eleventh Amendment claim, the Court of Appeals correctly ascertained that it had no jurisdiction to consider the unresolved Eleventh Amendment issue on appeal.

II. THERE ARE NO SPECIAL AND IMPORTANT REASONS TO GRANT THE PETITION.

The petitioner argues that the Eleventh Amendment immunity prohibits the Federal Courts from applying the doctrine of equitable tolling to the timely filing provision in Title VII, where the defendant-employer is a State. The petitoner characterizes equitable tolling as a "judge-made" doctrine which cannot be constitutionally applied against a State because it increases the abrogation of Eleventh Amendment immunity beyond what Congress

intended. The equitable tolling doctrine has as its source Article III federal judical power, argues the petitioner; this power cannot override the Eleventh Amendment.

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), this Court held that Congress can, and did, abrogate State sovereign immunity by enacting Title VII and making it applicable to public employers; this power stems from Section 5 of the Fourteenth Amendment. In Zipes v. Trans World Airlines, 455 U.S. 385 (1982), this Court determined that Congress intended that the timely filing provision in 42 USC §2000e-5(e) be a statute of limitations subject to the doctrines of waiver, estoppel, and equitable tolling. Congress did not intend this limitation to be a jurisdictional prerequisite.

The petitioner offers no convincing reason to infer that Congress intended a

different result where the State is the defendant. Thus, to the extent the doctrine of equitable tolling was ever a "judge-made doctrine", it lost that character when Congress intentionally incorporated it into Title VII. And to the extent this doctrine effects a distinct and further abrogation of sovereign immunity, the source of, and authority for, this abrogation is the Congressional power embodied in Section 5 of the Fourteenth Amendment, not the federal judicial power in Article III.

The petitioner thus incorrectly assumes that Zipes represents a judicial amendment to Title VII. Zipes is this Court's authoritative interpretation of a Congressional enactment. When the petitioner's fundamental misconception of Zipes is illuminated, the Eleventh Amendment claim evaporates.

Finally, the petitioner points to

no conflict among the federal courts of appeals. U.S. Sup. Ct. Rule 17, 28 USC. Its sole contention is apparently that its insubstantial and noncognizable Eleventh Amendment claim is an important federal question which should be resolved by this Court. The petitioner's view is extravagant.

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT IT HAD NO JURISDICTION OVER THE ATTEMPTED APPEAL

The only cognizable issue raised by the petitioner is whether the Court of Appeals correctly determined that it had no jurisdiction over the attempted appeal. The plaintiff will demonstrate that the ruling of the Court of Appeals must be sustained.

In the Court of Appeals, the petitioner sought review of the District Court's order denying petitioner's motion for summary judgment. More specifically, the petitioner sought reversal of the

order on the grounds that the immunity afforded the States by the Eleventh Amendment precludes utilization of the equitable tolling doctrine, where the defendant-employer to a Title VII action is one of the several States. This contention is reasserted in the Petition for a Writ of Certiorari.

The petitioner sought to invoke the jurisdiction of the Court of Appeals by contending the District Court's order denying its motion for summary judgment was appealable under the rule enunciated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). This Court has summarized the requirements for Cohen appellate jurisdiction as follows: "To come within the 'small class' of decisions excepted from the final-judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from

the merits of the action, and be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463,468 (1978) (footnote omitted). See also Moses H. Cone Memorial Hospital v. Mercury Constr. Corp. 460 U.S. 1, 11-12(1983); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981); United States v. MacDonald, 435 U.S. 850, 854-855 (1978); Abney v. United States, 431 U.S. 651, 658-659 (1977).

As noted above, the "disputed question" which the petitioner sought to raise in the Court of Appeals and which it also raises in its Petition in this Court is whether the Eleventh Amendment prohibits application of the equitable tolling doctrine against it in this case. The plaintiff will show that this "disputed question" was not "conclusively determined" by the District Court. Indeed, this question was neither considered nor determined by

the District Court at all. For this reason alone, the Court of Appeals was correct in ruling that no Cohen jurisdiction exists.

The District Court's failure to rule upon, or even to mention, the petitioner's Eleventh Amendment argument is readily understandable once it is explained that this argument was never raised in various memoranda of points and authorities which the petitioner was authorized to file in support of its motion for summary judgment. The plaintiff has demonstrated, in the Statement of Case, supra, that the Eleventh Amendment argument was first mentioned by the petitioner in a fugitive document filed just two days prior to the hearing on the motion for summary judgment.

Unsurprisingly, the District Court's order denying the petitioner's motion for summary judgment did not men-

tion, let alone consider, the State's newly interposed claim of Eleventh Amendment immunity.

After faulting the District Court for "simply ignor[ing] these claims of immunity" (Petition, p. 19), the petitioner apparently seeks to justify its dilatory conduct by resort to the rule that a claim of Eleventh Amendment immunity may be raised at any time. The petitioner relies upon Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).

Ford Motor Co. is inapposite. There the State of Indiana was permitted to urge a claim of Eleventh Amendment immunity for the first time in this Court. However, Ford Motor Co. was reviewed on certiorari after the case had been tried in the District Court, judgment had been entered, and the judgment had been affirmed by the Court of Appeals.

Ford Motor Co. cannot be read to

permit a State defendant to force the District Court to consider an Eleventh Amendment claim which is raised in utter disregard of the District Court's orderly rules of procedure. Nor can Ford Motor Co. be viewed as authority for the proposition that an Eleventh Amendment immunity claim is somehow exempt from the Cohen requirement that the disputed question must have been conclusively determined by the District Court.

The petitioner states that "[t]his Court has previously recognized that orders denying claims of absolute immunity based upon constitutional considerations must be treated as immediately appealable collateral orders." Petition, p. 12. In support of its statement, the petitioner cites this Court's opinions in Helstoski v. Meanor, 442 U.S. 500 (1979), Abney v. United States, 431 U.S. 651 (1977), and Nixon v. Fitzgerald, 457 U.S. 731

(1982); the petitioner also cites this Court's order granting a Petition for a Writ of Certiorari in Mitchell v. Forsyth, Dk. No. 84-335, cert. granted, _____ U.S. _____, 105 S.Ct. 322 (1984).

In Helstoski v. Meanor, supra, the Court did hold that a defendant in a criminal case could have taken a direct, immediate appeal from an order rejecting his contention that the proceedings against him were in violation of the Speech or Debate Clause. Helstoski, 442 U.S. at 506. However, in Helstoski, unlike here, the issue had been duly raised by a motion to dismiss in the District Court and had been conclusively determined by such Court. Id. at 504.

In Abney v. United States, supra, the Court held that an order rejecting a double jeopardy claim was immediately reviewable under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541

(1949). However, the distinguishing feature of Abney is the same as that of Helstoski, i.e., the claim of immunity was properly presented to, and conclusively determined by, the District Court. Abney, 431 U.S. at 655.

The petitioner's utilization of Nixon v. Fitzgerald, supra, is similarly flawed. As in Helstoski and Abney, the immunity claim was raised properly in the District Court and was conclusively decided by such Court. Nixon, 457 U.S. at 740 n. 20.

Finally, the petitioner's citation to this Court's order granting certiorari is less than helpful. The mere grant of certiorari in Mitchell v. Forsyth, Dk. No. 84-335, cert. granted, _____ U.S. _____, 105 S.Ct. 322 (1984), does not constitute authority for the proposition that an appeal may be taken from an order denying summary judgment on a claim of

qualified immunity. Moreover, an examination of the reported decisions in the Mitchell litigation reveals that the petitioner therein had properly raised the issue in the District Court and had obtained a conclusive determination of the issue. See Forsyth v. Kleindienst, 447 F.Supp. 192 (E.D. Penn. 1978).

Before closing her discussion of the Cohen issue, the plaintiff wishes to point out that all three of the questions presented in the Petition are inextricably intertwined with the petitioner's errant Eleventh Amendment immunity claim. Petition, p.i. Thus, the petitioner is not, in its Petition before this Court, seeking review of the District Court's application of the equitable tolling doctrine, apart from the Eleventh Amendment considerations.

Finally, the plaintiff wishes to underscore the fact that the sole issue

decided by the Court of Appeals was that it had no appellate jurisdiction. It simply cannot be contended, in good faith, that by this determination the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." U. S. Sup. Ct. Rule 17(a), 28 USC. Indeed, the Court of Appeals merely allowed the proceeding to continue in their usual course and has sanctioned only the District Court's refusal to decide an issue which was raised in disregard for that Court's orderly procedural rules.

Nor can it be said that the Court of Appeals, in finding a lack of appellate jurisdiction, "has decided an important question of federal law which has not been, but should be, settled by this

Court." U. S. Sup. Ct. Rule 17(c), 28 USC. The Court of Appeals' dismissal stands only for the unremarkable proposition that that Court has no Cohen appellate jurisdiction over issues which were undecided by the District Court due to the proponent's failure to raise such issues in conformity with the District Court's procedural rules.

II. THERE ARE NO SPECIAL AND IMPORTANT REASONS TO GRANT THE PETITION FOR A WRIT OF CERTIORARI

This Court will exercise its discretion to grant a petition for a writ of certiorari "only when there are special and important reasons therefor." U.S. Sup. Ct. Rule 17, 28 USC; see also, Fay v. Noia, 372 U.S. 391, 436 (1963). Wholly apart from the procedural considerations which validate the Court of Appeals' determination that it had no appellate jurisdiction, the plaintiff submits that the petitioner's Eleventh Amendment claim

is so lacking in merit that review by way of certiorari is inappropriate.

The petitoner contends that the Eleventh Amendment prohibits the District Court from applying the doctrine of equitable tolling in a Title VII case, where the defendant-employer is one of the several States. The petitioner recognizes that Congress has accomplished a limited abrogation of the States' Eleventh Amendment immunity by enacting Title VII. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). However, it contends that Congress has only abrogated this immunity in cases in which the claimant satisfies the statutory procedural prerequisites, including the requirement that the charge be filed with the EEOC within the 180-day period specified by 42 USC §2000e-5(e). Petition, pp. 21-22. As support for this statement, the petitioner points to footnote 2 of this Court's opinion in

Fitzpatrick, supra.

The pertinent paragraph in Fitzpatrick merely states as follows:

> The 1972 Amendments retained the right of an individual aggrieved by an employer's unlawful employment practice to sue on his or her own behalf, upon satisfaction of the statutory procedural prerequisites, and made clear that that right was being extended to persons aggrieved by public employers. See 1972 Amendments §4(a), 86 Stat. 104, 42 USC §§2000e-5(a)-(g) (1970 ed., Supp. IV).

Id. at 449 n. 2. Apparently, the petitioner attaches special significance to the phrase "upon satisfaction of the statutory procedural prerequisites." Id. But, the foregoing phrase obviously refers to the Court's general language concerning suits by both private and public employees; nothing in the text of footnote 2 can be fairly read to suggest a distinction between the application of Title VII's procedural prerequisites in suits by public as opposed to private employees.

The petitioner also recognizes that

this Court has held that the 180-day period set forth in 42 USC §2000e-5(e) is subject to the doctrine of equitable tolling. Zipes v. Trans World Airlines, 455 U.S. 385 (1982). It argues, however, that this "judge-made doctrine" cannot constitutionally be applied against it, a sovereign State; such utilization of Article III power by the Federal Courts, argues the petitioner, constitutes "fundamental constitutional error". Petition, pp. 23-25. In short, the petitioner contends that the "judge-made doctrine" of equitable tolling cannot override the immunity conferred by the Eleventh Amendment.

With all due respect, the plaintiff submits that the petitioner has misapprehended the nature of the equitable tolling doctrine and has misunderstood this Court's holding in Zipes v. Trans World Airlines, 455 U.S. 385 (1982).

The petitioner's Eleventh Amendment

argument is bottomed upon the assumption that Zipes is a judicial addendum to Title VII; this assumption is, of course, patently incorrect. Zipes involves this Court's interpretation of "Congress-made" law, not its usurpation of Congresional power by way of a "judge-made" amendment to 42 USC §2000e-5(e).

In Zipes this Court looked to the very language of Title VII and found that such language "does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC." Zipes, 455 U.S. at 393 (footnote omitted). The Court also noted that, "[t]he provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." Id. at 394 (footnote omitted).

In the "sparse" legislative history

relating to the filing provision, the Court found further support for its determination that Congress intended the provision to be a period of limitations, subject to waiver, estoppel, and equitable tolling; not a jurisdictional prerequisite. Id. Similarly, the Court observed that the subsequent legislative history "also indicates Congress intended the filing period to operate as a statute of limitations instead of a jurisdictional requirement." Id.

The Zipes Court pointed out also that Congress, in enacting the amendments to Title VII, had approved the Court of Appeals cases awarding relief to class members who had not exhausted their administrative remedies before the EEOC. "It is evident that in doing so, Congress necessarily adopted the view that the provision for filing charges with the EEOC should not be construed to erect a juris-

dictional prerequisite to suit in the district court." Id. at 397.

In sum, Zipes is replete with indications that the utilization of equitable tolling of the timely filing provision in Title VII cases is Congressionally mandated. The petitioner points to absolutely no evidence that Congress had a different intent in those Title VII cases which name State sovereigns as defendants. Thus, to the extent that utilization of the doctrine of equitable tolling in such cases can be viewed as a distinct and further abrogation of Eleventh Amendment immunity, this abrogation flows directly from the governmental body which is constitutionally empowered to accomplish it.

The petitioner claims to find support for its Eleventh Amendment contention in Block v. North Dakota, 461 U.S. 273 (1983), and Pennhurst State School & Hospital v. Halderman, _____ U.S. _____,

104 S.Ct. 900 (1984). Block is cited for the proposition that, "[w]hen Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed." Petition, p. 23.

Other relevant language from Block reads as follows:

> When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity. Accordingly, although we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would "extend the waiver beyond that which Congress intended." (Citations omitted; emphasis added.)

Id. at 287.

The foregoing language from Block can only be construed to support the petitioner's claim if it is read in a vacuum. When it is read in light of Zipes v. Trans World Airlines, supra, it supports the plaintiff's position. This is because, as noted above, the Zipes

decision establishes that "Congress intended" the doctrine of equitable tolling to apply in Title VII cases. And there is no evidence to support an inference that a contrary result was intended where the defendant is a State.

The petitioner's treatment of Pennhurst is equally unpersuasive. The petitioner correctly points out that in Pennhurst this Court held that the judge-made doctrine of pendent jurisdiction, derived from the general language of Article III conferring power to hear all "cases" arising under federal law or between diverse parties, cannot override the Eleventh Amendment prohibition against a suit naming a nonconsenting State as a defendant.

The analogy which the petitioner attempts to draw between the judge-made doctrine of pendent jurisdiction and the "judge-made" doctrine of equitable tolling

is demonstrably imperfect. As noted above, Congress has the power to abrogate the Eleventh Amendment in order to enforce the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Title VII is an exercise of this power. Id. And this Court has determined that Congress intended the timely filing requirement in Title VII to be subject to the doctrines of waiver, estoppel, and equitable tolling. Consequently, if the doctrine of equitable tolling was ever appropriately characterized as a "judge-made" doctrine, it became part of the Congressional abrogation of the Eleventh Amendment when Congress intentionally included it as part of Title VII's timely filing requirement.

In light of the foregoing, it is evident that the petitioner's Eleventh Amendment claim, even if cognizable at this juncture, is so insubstantial that it falls far short of the standards which

govern this Court's consideration of petitions for writs of certiorari. The plaintiff is aware of no conflict among the federal courts of appeals on this issue and is aware of no other criteria in U. S. Sup. Ct. Rule 17 which would militate toward grant of the petiiton.

CONCLUSION

For the foregoing reasons, the plaintiff respectfully submits that the Petition should be denied.

DATED: April 17, 1985.

Respectfully submitted,

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APPENDICES

APPENDIX A

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

VIRGINIA M. OLIVER, Plaintiff, vs. STATE OF NEVADA, et al., Defendants.	No. CV-R-83-ECR MOTION FOR SUMMARY JUDGMENT Filed: May 26, 1983

Defendant, STATE OF NEVADA, DEPARTMENT OF WILDLIFE, by and through its attorney, Brian McKay, Nevada Attorney General, moves this Court pursuant to Rule 56, Federal Rules of Civil Procedure, for an order for summary judgment dismissing the complaint filed herein as against this defendant on the grounds that there is no

genuine issue of fact and that this defendant is entitled to judgment in its favor as a matter of law.

This motion is made and based upon all pleadings, depositions, affidavits, exhibits and points and authorities on file and/or served concurrently herewith.

DATED this 24th day of May, 1983.

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By: /s/ Don Christensen

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

VIRGINIA M. OLIVER, Plaintiff, vs. STATE OF NEVADA, et al., Defendants.	NO. CV-R-83-ECR POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT Filed: 5/26/83

Plaintiff has filed a complaint against defendant in which she has attempted to allege a claim for relief for sex discrimination pursuant to 42 U.S.C. §2000e et seq. Plaintiff has alleged that the defendant and certain employees of the defendant discriminated against her on the basis of her sex until her employment with the defendant ceased on July 31, 1981.

Plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) and attached a copy of the charge to the complaint. (Exhibit B to the complaint). A review of the charge shows that plaintiff signed it on March 30, 1982. The charge was received by the EEOC on April 2, 1982, 245 days after July 31, 1981, and referred to the Nevada Equal Rights Commission (NERC) on April 5, 1982, 248 days after July 31, 1981. (See Exhibit 1) [Exhibit omitted]. NERC referred the charge back to the EEOC on or after October 19, 1982. (See Exhibit 2) [Exhibit omitted] A right to sue letter was issued on December 6, 1982. (See Exhibit A to the complaint).

42 U.S.C. § 2000-e-5(e) states the general rule that a "charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . ."

Plaintiff's charge was received by the EEOC on the 245th day after her last day of employment. Therefore, plaintiff's charge was not filed in a timely manner under the general rule.

42 U.S.C. §2000e-5(e) also contains an exception to this general rule. The exception allows a filing with the EEOC after 180 days if "the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . ." This filing with the EEOC cannot occur until 60 days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated. 42 U.S.C. §2000e-5(c).

The Nevada Equal Rights Commission (NERC), established pursuant to chapter 233 of NRS, appears to be a state agency of the type contemplated by 42 U.S.C. §2000e-5(e). NERC may order an offending

party to cease its unlawful practice and restore all benefits and rights to the aggrieved party. NRS 233.170. NERC is authorized to investigate alleged practices of discrimination based on a person's sex. NRS 233.250. Therefore, plaintiff appears to have instituted proceedings with an appropriate State agency when the EEOC referred the charge to the NERC on April 5, 1982. Mohasco Corporation v. Silver., 447 U.S. 807, 816, 65 L.Ed.2d 532, 542 100 S.Ct. 2486, 2492 (1980).

The exception goes on to require that the "charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier . . ." Since

the State proceedings did not terminate until long after the expiration of the 300 day period, the 300 day limitations period is the one applicable to plaintiff's charge. However, under the applicable case law, plaintiff's charge was not filed with the EEOC until 308 days after the last alleged date of discrimination and therefore was untimely filed.

In Mohasco, supra, respondent's charge was received by the EEOC 291 days after his discharge. The EEOC referred the matter to the appropriate state agency. After several months the state agency determined that there was no merit to the charge. The EEOC eventually agreed with that conclusion and issued a right to sue letter.

As noted above, 41 U.S.C. §2000e-5(c) states that no charge may be filed with the EEOC before the expiration of 60 days after proceedings have been earlier

terminated. The Mohasco Court concluded that this statute prohibited the EEOC from filing respondent's charge on the date it was received. While it was propr for the EEOC to hold respondent's charge in "suspended animation", automatically filing it upon the expiration of the 60 day period, that meant that the charge was filed on the 351st day, not the 291st. By that time, the 300 day period had run and the filing was therefore untimely.

The conclusion that must be drawn from the holding in Mohasco is that:

> "a complainant in a deferral State having a fair employment practices agency over one year old need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved. If a complainant files later than that (but not more than 300 days after the practice complained of), his right to seek relief under Title VII will nonetheless be preserved if the State happens to complete its consideration of the charge prior to the end of

the 300-day period." Id, n. 16 at 814, 65 L.Ed.2d at 541, 100 S.Ct. at 2491.

As discussed above, plaintiff's charge was received by the EEOC on the 245th day after the last alleged date of discrimination. It was referred to the NERC on the 248th day. Since the NERC did not terminate its investigation within 60 days of the date of referral, the charge was considered automatically filed with the EEOC on the 308th day. This filing was therefore untimely.

The lower courts have also required charges to be received by the EEOC within 240 days after the last date of alleged discrimination in deferral states in accordance with the rule set forth in Mohasco. See Penk v. Oregon State Board of Higher Education, 93 F.R.D. 45, 53 (D. Oreg. 1981) Williams v. Owens-Illinois, Inc., 665 F.2d 918, 923 n.2 (9th Cir. 1982). The application of this rule to

the present case requires the dismissal of the first claim for relief for failure of the plaintiff to exhaust her administrative remedies in a timely manner as required by law and because the applicable statute of limitations bars this action. Plaintiff's motion for partial summary judgment as to the second, third and sixth affirmative defenses should be denied for the same reasons.

Plaintiff's motion for partial summary judgment also requests a ruling on the "viability" of defendant's fourth affirmative defense. Plaintiff has made no reference to this ground in her memorandum of points and authorities in support of her motion, and asks only for summary judgment on the second, third and sixth affirmative defenses in that memorandum. Local Rule 16 states that the failure of a moving party to file a memorandum in support of a motion shall

constitute a consent to the denial of the motion. Therefore, defendant requests that plaintiff's motion for partial summary judgment as to the fourth affirmative defense also be denied.

A review of the complaint reveals that no allegations have been made against this defendant other than in the first claim for relief. Therefore, for the foregoing reasons, defendant requests that plaintiff's motion for partial summary judgment be denied. Defendant further requests that its motion for summary judgment be granted and that the complaint be dismissed with prejudice as against this defendant.

DATED this 24th day of May, 1983.

BRIAN McKAY
Attorney General

By: /s/ Don Christensen

Don Christensen
Deputy Attorney General

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

VIRGINIA M. OLIVER, Plaintiff, vs. STATE OF NEVADA, et al., Defendants.	NO. CV-R-83-ECR DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT Filed: June 29, 1983

Defendant STATE OF NEVADA DEPARTMENT OF WILDLIFE has filed its motion for summary judgment requesting dismissal of the complaint as against this defendant for failure of the plaintiff to exhaust her administrative remedies in a timely manner was required by law and because the applicable statute of limitations bars this action. While plaintiff has filed a

"declaration" in support of her response, she does not seek to rebut any of the factual contentions made by defendant. Instead, she seeks to oppose defendant's motion on the ground that defendant should be estopped from asserting plaintiff's failure to file a timely charge as a defense.

Defendant [sic] has filed a declaration by her attorney in support of her response. Defendant objects to any consideration of this document since it fails to comply with the requirements of Federal Rule of Civil Procedure 56(e). Automatic Radio Manufacturing Co. v. Hazeltine Research, 339 U.S. 827, 94 L.Ed. 1312, 70 S.Ct. 894 (1950), reh. den. 340 U.S. 846 and overruled on other grounds, Lear, Inc. v. Adkins, 395 U.S. 653, 23 L.Ed.2d 610, 89 S.Ct. 1902.

The ordinary elements of estoppel are:

> "(1) The party to be estopped must know the facts;
>
> (2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
>
> (3) The latter must be ignorant of the true facts; and
>
> (4) He must rely on the former's conduct to his injury." United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978).

Additionally, when estoppel is asserted against the government there must be a showing that the governmental conduct amounts to an "affirmative misrepresentation" of a material fact. Id. 703-704. Since the undisputed facts show that the plaintiff has failed to file her charge with the EEOC in a timely manner, the plaintiff has the burden of proving that the time limit should be extended. Cooper v. Bell, 628 F.2d 1208, 1214 n. 11 (9th Cir. 1980). A review of the facts presented reveals that plaintiff has failed to

carry her burden.

Plaintiff has not shown that defendant knew the facts involved in her claim of estoppel. According to her declaration, plaintiff obtained a copy of defendant's non-discrimination policy in December, 1981, at least four months after her employment ceased. While plaintiff does not state how she obtained this copy, she does not claim that an agent of the defendant procured it for her nor does she claim that any supervisory personnel knew that she had obtained a copy. She also makes no claim that any agent of the defendant knew that she was relying on this policy in order to determine the procedure for filing a charge of employment discrimination. In short, plaintiff has failed to state any facts from which it can be concluded that defendant knew of the facts involved in plaintiff's claim of estoppel. Therefore, plaintiff has failed to estab-

must establish is that she relied on defendant's conduct to her injury. Some courts impose the requirement that any reliance must be reasonable. Smillie v. Park Chemical Co., 466 F.Supp. 572, 575 (E.D.Mich. S.D. 1979) Beverly Enterprises v. Califano, 446 F.Supp. 599, 604 (D.C. 1978). Such a requirement is not burdensome and protects parties from claims that could not be anticipated.

Plaintiff's alleged reliance on defendant's policy was patently unreasonable. As discussed above, the policy makes no claim that it is providing information on how to file sex discrimination claims. The term "sex," is not contained in the sections that provide information for filing complaints since Title VI does not prohibit discrimination on the basis of sex. 42 U.S.C. § 2000d. Therefore, any alleged reliance by plaintiff on this policy with regard to the proper course of

action for filing a sex discrimination complaint was unreasonable. The unreasonableness is highlighted by the fact that the EEOC apparently informed her of the correct procedure some four months prior to her obtaining defendant's policy.

Finally, plaintiff has also failed to estabish that defendant made an affirmative misrepresentation of a material fact to her. Defendant is an agency of state government as alleged in the complaint and admitted in the answer. Therefore, plaintiff must show that defendant made such misrepresentation.

Plaintiff makes no claim that defendant's policy contains any misrepresentation of a material fact. Defendant is required to make available to participants, beneficiaries and other interested persons the information contained in the policy due to defendant's acceptance of federal financial assistance. 43 C.F.R. §

17.5(d). Defendant did nothing more than adhere to this requirement by promulgating this policy and should not now be penalized for doing so.

Plaintiff's argument in support of her theory makes reference to two cases, Bragg v. Reed, 592 F.2d 1136 (10th Cir. 1979) and Ettinge v. Johnson, 556 F.2d 692 (3rd Cir. 1977). Both cases involve specific administrative regulations that pertain only to actions by federal employees and thus are of no value in this matter. Furthermore, plaintiff admits that she was informed of the filing deadline.

Plaintiff's decision to pursue a nonexistent Title VI remedy was entirely her own decision and was made without any misrepresentation by the defendant. Even if she had a Title VI remedy, her pursuit of that remedy would not toll the limitations period contained in Title VII. Stafford v. Muscogee County Bd. of Educ.,

688 F.2d 1383 (11th Cir. 1982).

"Estoppel should be applied against the Government with utmost caution and restraint." Schuster v. Commissioner of Internal Revenue, 312 F.2d 311, 317 (9th Cir. 1962). Plaintiff has failed to establish the elements necessary to invoke the doctrine of equitable estoppel. Plaintiff has admittedly failed to file her charge of discrimination with the EEOC in a timely fashion. Since there is no genuine issue of material fact to be resolved, defendant is entitled to summary judgment and the dismissal of the complaint as to it.

DATED this 29th day of June, 1983.

BRIAN McKAY
Attorney General

By: /s/ Don Christensen

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Deputy Attorney General

APPENDIX C

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

VIRGINIA M. OLIVER, Plaintiff, vs. STATE OF NEVADA, et al., Defendants.	NO. CV-R-83-ECR DEFENDANT'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES Filed: 10/3/83

This Court has invited each party to submit a supplemental memorandum of points and authorities with respect to how or whether the cases listed in the Court's order of September 13, 1983, should be considered by the Court in deciding defendant's motion for summary judgment. A review of those cases reveals that, in

light of the applicable decisions of the U.S. Supreme Court, these cases should not serve as precedent in this matter. Furthermore, even if these cases are considered as being persuasive authority, plaintff's filing of her charge with the EEOC was still untimely.

In Johnson v. Railway Express Agency, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975), the Supreme Court held that the statute of limitations relating to a plaintiff's claim made pursuant to 42 U.S.C. § 1981 was not tolled during the pendency of the review of the plaintiff's Title VII claim before the EEOC. The Court found that the two remedies under each statute were completely independent. 421 U.S. at 466, 95 S.Ct. at 1723, 44 L.Ed.2d at 305. With the exception of the case of Equal Employment Opportunity Commission v. Nicholson File Company, 408 F.Supp. 229 (D.Conn. 1976), the cases

cited by the Court either predate or fail to discuss the holding in Johnson.

Of the cases cited by this Court only Nicholson discussed the holding in Johnson. The decision in the Nicholson case predated the decision in International Union of Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976). Therefore, the discussion of the Johnson case in the Nicholson case occurred without the benefit of the decision in Robbins.

The Court in Robbins noted that since Congress had extended the period for filing a charge with the EEOC in those states which have an agency with the authority to grant or seek relief from the discriminatory practice, the negative implication arises that Congress did not intend to allow extensions of the limitations period while a claimant pursues remedies independent of those

available through Title VII. 429 U.S. at 240, 97 S.Ct. at 449, 50 L.Ed.2d at 437. The only decision that has considered the combined effect of Johnson and Robbins reached the conclusion that pursuit of a Title VI claim does not toll the Title VII filing period. Stafford v. Muscogee County Board of Education, 688 F.2d 1383 (11th Cir. 1982).

The decision in Stafford is consistent with the holdings of Johnson and Robbins. The remedy afforded a successful Title VI claimant is independent of that afforded a successful Title VII claimant. See 43 C.F.R. § 17.7. Neither Johnson or Robbins required the claimant to be successful in pursuit of a non-Title VII remedy. Therefore, the holdings of these cases requires the conclusion that plaintiff is not entitled to the benefit of the doctrine of equitable tolling in this matter.

The cases cited in this Court's order should also be distinguished on a factual basis from the present case. In this case plaintiff discussed her claim with a representative of this EEOC just four days after her final day of employment with defendant. Declaration of Virginia M. Oliver. With this information in mind, plaintiff proceeded to take no action on her complaint for over five months. Then, completely on her own initiative, plaintiff decided to pursue a different course of action by sending a letter to the Department of the Interior.

None of the cases cited in this Court's order involved a similar factual situation. The equities in those cases favored the claimants. The plaintiff in this case took it upon herself to disregard the information she received from the EEOC. This Court should not be responsible for protecting the plaintiff

from the consequences of her own voluntary actions. See Bledsoe v. Pilot Life Insurance Co., Inc., 473 F.Supp. 864 (M.D.N.Car. 1978).

Even if this Court determines that the theory of equitable tolling is applicable to the plaintiff's claim, her claim was still not filed with the EEOC in a timely manner. The time for filing plaintiff's claim with the EEOC is tolled only from the date plaintiff sent her letter to the Department of the Interior until she received a response from that agency. Because plaintiff did not file a timely claim with the Nevada Equal Rights Commission, she was not entitled to the 300-day extended filing period. Instead, she was required to file her claim with the EEOC within 180 days of the last claimed date of discrimination. Even with the tolling of this 180 day period, plaintiff still failed to make a timely

filing with the EEOC.

As previously discussed, 42 U.S.C. § 2000e-5(e) requires a charge to be filed within 180 days after the alleged unlawful employment practice occurred unless "the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . ."

The Nevada Equal Rights Commission has no authority to grant or seek relief from an allegedly unlawful discriminatory practice unless a complaint is filed no later than 180 days after the date of the occurrence of the alleged practice. NRS 233.160. Even if this 180 day period was tolled during the interchange with the Department of the Interior, plaintiff still did not file her complaint with the Nevada Equal Rights Commission within the 180 day period.

The proposition that a claimant is

not entitled to the extended 300 day filing period unless she has complied with the applicable state filing period has been accepted by a number of courts. See Dubois v. Packard Bell Corporation, 470 F.2d 973 (10 Cir. 1972); Mobley v. Acme Markets, Inc., 473 F.Supp. 851 (D.Md. 1979); Gunn v. Dow Chemical Company, 522 F.Supp. 1172 (S.D. Ind. 1981); Battle v. Clark Equipment, Brown Trailer Division, 524 F.Supp. 683 (N.D.Ind. 1981) and Lowell v. Glidden Durkee, 529 F.Supp. 17 (N.D.Ill. 1981).

Claimants in these cases have made the argument that the requirement of a timely filing with a state or local agency in order to obtain the benefit of the extended 300 day filing period deprives them of their right to federal relief. The lack of substance to this argument is made clear when it is pointed out that, in the absence of an appropriate state or

local agency, a claimant has no right to an extended filing period. See e.g., Dubois, supra, at 975.

The authority of these cases requires this Court to find that plaintiff's failure to file a complaint with the Nevada Equal Rights Commission within the time period specified by NRS 233.160 means that plaintiff was not entitled to the extended 300 day period within which she could file a charge with the EEOC. Instead, plaintiff was required to file that charge within 180 days. Even if this Court allows the tolling of this period during the time of the interchange of letters between plaintiff and the Department of the Interior, plaintiff still failed to file her charge with the EEOC within the 180 day period. Therefore, plaintiffs' filing was untimely and defen-

dant's motion for summary judgment should be granted.

DATED this 30th day of September, 1983.

BRIAN McKAY
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By: /s/ Don Christensen

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APPENDIX D

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

VIRGINIA M. OLIVER, Plaintiff, vs. STATE OF NEVADA, et al., Defendants.	NO. CV-R-83-ECR DEFENDANT'S POINTS AND AUTHORITIES IN REPLY TO PLAINTIFF'S SUPPLEMENTAL POINTS AND AUTHORITIES Filed: 10/19/83

Plaintiff has raised for the first time the argument that the complaint alleges a continuing violation of Title VII. Under the applicable case law, this argument is clearly without merit.

A complainant who has been discharged must file a change [sic] with the EEOC within the requisite time period after the

termination or be time-barred. The fact that a complainant allegedly continues to suffer from an alleged past violation beyond this time period does not mean that a continuing violation has occurred. "[M]ere continuing impact from past violations is not actionable. Continuing violations are." Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924 (9th Cir. 1982).

Plaintiff has not alleged in her complaint nor submitted any evidence to this Court that she is a victim of a continuing violation of Title VII. There is no allegation nor evidence that plaintiff has ever sought or even desired re-employment with the defendant since July 31, 1981. Plaintiff has never claimed that the alleged practices of the defendant has violated any right of hers since her last date of employment. Plaintiff claims only that she continues

to suffer the impact of past violations. As the Court in Williams pointed out, a complainant who has ceased to be an employee is "out of reach of any further effect of company policy . . ." Id. Therefore, plaintiff was required to file her charge with the EEOC within 180 days after July 31, 1981. Her failure to do so bars this action.

The cases cited by plaintiff in support of her argument that the continuing violation theory is applicable are not on point. Plaintiff has never alleged that she applied for re-employment after her termination and was rejected as was the case in Inda v. United Air Lines Inc., 565 F.2d 554 (9th Cir. 1977). Likewise, plaintiff has never claimed that defendant disseminated adverse references after her last day of employment as in Shehadeh v. Chesapeake & Potomac Telephone Co., 595 F.2d 711 (D.C. Cir. 1978).

Therefore, these cases lend no support to plaintiff's argument.

The undisputed facts show that plaintiff failed to file her charge with the EEOC in a timely manner. As discussed in defendant's supplemental memorandum, the time period for filing a charge should not be tolled because plaintiff, unilaterally and contrary to the information received from the EEOC, chose to pursue her complaint through the Department of the Interior.

Even if this Court determined that this time period should be tolled, plaintiff's charge was still not filed in a timely manner. Plaintiff sent her letter to the Department of the Interior on or after January 14, 1982. The Department of the Interior responded on February 12, 1982. If the time period for filing a charge is tolled between these dates, plaintiff was entitled to an

additional twenty-nine days to file her charge with the EEOC. This twenty-nine day period added on to the 180 day period within which plaintiff was required to file extended plaintiff's filing period until February 25, 1982.

Plaintiff alleged in her complaint that the charge she filed with the EEOC was attached as an exhibit to the complaint. Defendant admitted that this was the charge plaintiff filed with the EEOC. This charge was not signed by the plaintiff until March 30, 1982. Plaintiffs' allegation constitutes a judicial admission that plaintiff's charge was not filed until at least that date. See Hall v. United States, 314 F.Supp. 1135 (N.D.Cal. 1970). Therefore, even if this Court applies the principle of equitable tolling in this case, plaintiff's charge was not filed in a timely manner and defendant's motion for

summary judgment should be granted.

DATED this 18th day of October, 1983.

BRIAN McKAY
Attorney General

By: /s/ Don Christensen

Don Christensen
Deputy Attorney General

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

VIRIGINIA M. OLIVER,

Plaintiff, CV-R-83-75-ECR

vs. O R D E R

STATE OF NEVADA, et al., Filed: 12/13/83

Defendants.
_____/

Plaintiff claims that she was terminated from a position with the Nevada Department of Wildlife (NDOW) due to illegal sex discrimination under Title VII of the Civil Rights Act of 1964, 41 U.S.C. § 2000e et seq. Defendants filed an answer which raised several affirmative defenses. Plaintiff then filed a motion for partial summary judgment as to four of these affirmative defenses. The defenses under attack are:

1. Plaintiff failed to exhaust her administrative remedies (Second

Affirmative Defense);

2. Plaintiff failed to exhaust her administrative remedies in a timely manner (Third Affirmative Defense);

3. The defendants at all times have acted in good faith and upon reasonable grounds in performance of all duties assigned to them (Fourth Affirmative Defense);

4. Plaintiff's claims are barred by the applicable statute of limitations (Sixth Affirmative Defense).

Defendant NDOW has in turn filed a motion for summary judgment, contending that plaintiff's claim was not filed within the period prescribed by 42 U.S.C. § 2000e-5.

Facts

Plaintiff was terminated from her position with NDOW on July 31, 1981. She claims that she contacted the federal Equal Employment Opportunity Commission (EEOC) by telephone, but that she was unable to obtain any information as to how to pursue a sex discrimination claim. In December of 1981, she obtained a copy of

NDOW's amended non-discrimination policy. This policy was intended to facilitate compliance with the U.S. Department of Interior's Title VI guidelines. Title VI prohibits discrimination on the basis of face, [sic] color, national origin, age, or handicap in any program or activity receiving Federal financial assistance. It does not prohibit employment discrimination or sex discrimination.

The NDOW non-discrimination policy, however, recited that

> It is the policy of this Department that no person in the United States shall on the grounds or [sic] race, color, sex, national origin, age, or handicap be excluded from participating in, denied the benefits of, or subjected to discrimination under any Department program or activity.

[Emphasis added.] The policy also recommended that

> If you believe that you have been discriminated against in any program, activity or facility, it is your right to file a written complaint with:

The Office of Equal Opportunity
U.S. Department of the Interior
Office of the Secretary,
Washington, D.C. 20240

Plaintiff interpreted the NDOW policy to mean that she could file her claim of employment discrimination with the Department of the Interior (DOI). On January 14, 1982, she wrote a letter to the DOI's Office of Equal Opportunity. The letter contained the specifics of her discrimination claim. On February 12, 1982, DOI advised her that they had no jurisdiction to resolve employment discrimination claims, and referred plaintiff to the EEOC. On March 9, 1982, plaintiff forwarded to the EEOC a copy of the letter she had originally sent to DOI. The EEOC received this letter on March 11, 1982, 192 days after plaintiff's termination. Plaintiff received a "right to sue" letter from the EEOC on December 6, 1982. The complaint in the lawsuit was filed on March 4, 1983.

Discussion

In order to assert a claim of discrimination under Title VII, a claimant must file a complaint with the EEOC within 180 days after the alleged discriminatory practice occurred. 42 U.S.C. § 2000e-5(e) Plaintiff contends that the 180-day period should be tolled for the period in which she was pursuing her claim with DOI, pointing out that the Supreme Court has held that Section 2000e-5(e)'s requirement that a timely charge of discrimination be filed with the EEOC is subject to equitable tolling. Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982).

Whether equitable relief from § 2000e-5(e)'s limitations period is appropriate will depend on whether plaintiff was justified in pursuing her sex discrimination claim with DOI. This will in turn depend upon the reasonableness of her belief that NDOW's non-discrimination

policy was "the official policy for filing sex discrimination claims against NDOW." Declaration of *Virigina M. Oliver (June* 24, 1983). The Court finds that an evidentiary hearing is necessary in order to resolve this issue.[1]

IT IS, THEREFORE, HEREBY ORDERED that this matter is set for hearing on Monday, February 13, 1984, at 9:30 a.m. in Courtroom No. 1 of the United States Courthouse, 300 Booth Street, Reno, Nevada, for the purpose of receiving evidence on the issue described in the preceding paragraph of this Order. Arguments may be made to the Court after the evidence has been presented.

DATED: December 12, 1983.

/s/ EDWARD C. REED
UNITED STATES DISTRICT JUDGE

Footnote

[1] Since the reasonableness of this belief cannot be within the "personal knowledge" of the plaintiff, this issue cannot be resolved on the basis of affidavits filed under Fed.R.Civ.P. 56.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

VIRGINIA M. OLIVER	CIVIL-R-83-75-ECR
Plaintiff,	MINUTES OF THE COURT
vs.	DATE: 1/19/84
STATE OF NEVADA, et al.,	
Defendants.	

PRESENT: EDWARD C. REED, JR., U.S. DISTRICT JUDGE

Deputy Clerk: E. Ann Cook

Reporter: None Present

Counsel for Plaintiff(s) None Present

Counsel for Defendant(s) None Present

MINUTE ORDER IN CHAMBERS: XXXX

IT IS ORDERED that the motion of plaintiff for an order enlarging the time to effect service of defendants Joe Greenley, Larry Barngrover, and William Molini (#28), is GRANTED. Good cause has been shown for failure to make service within the required time limit of Rule 4(j), Fed.R.Civ.P. Plaintiff shall have to and including February 17, 1984, within which to make service of summons and complaints on said defendants.

IT IS FURTHER ORDERED that the motion of Joe Greenley and Larry Barngrover to dismiss pursuant to Rules 4(j), 12(b)(5) and 41(b), Fed.R.Civ.P. (#26) is DENIED.

IT IS FURTHER ORDERED plaintiff's motion for the substitution of William Molini as a defendant in the place of Joe Greenley, as Director of the Nevada Department of Wildlife (#28) is GRANTED.

IT IS FURTHER ORDERED the hearing set by Order of this Court dated December 12, 1983 (#32) for February 13, 1984 is continued to March 5, 1984 at 2:00 o'clock P.M. This continuance is ordered in light of the other orders which the court has entered this day.

IT IS FURTHER ORDERED defendants State of Nevada and Nevada Department of Wildlife's Motion for Protective Order (#35) is GRANTED. The proposed inquiry by plaintiff is overly broad and without demonstrated relevance to this case. It could be that such proposed inquiry could be narrowed by plaintiff so as to provide relevant information or evidence.

IT IS FURTHER ORDERED that the Motion to Compel Production of Documents (#36) filed by defendants is DENIED without prejudice to renew the same. Denial is on the basis of an apparent failure to comply with Local Rule 17(A)4(b). Defendants have not filed any Reply indicating compliance with said rule.

CAROL C. FITZGERALD, CLERK

By: /s/ E. Ann Caah
Deputy Clerk

APPENDIX G

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

VIRGINIA M. OLIVER, Plaintiff, vs. STATE OF NEVADA, et al., Defendants.	NO. CV-R-83-ECR SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO EQUITABLE TOLLING Filed: March 2, 1984

Plaintiff seeks to avoid the 180-day limitations period contained in 41 U.S.C. § 2000-5e by urging an equitable tolling under the doctrine of Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). Plaintiff claims that she is entitled to a tolling of the limitations

period because she asserted a Title VII claim before the Department of Interior. The Department of Interior is only concerned with Title VI claims as to programs which receive federal financial assistance under a law administered by the Department of Interior. See e.g. 43 CFR 17.2.

Even assuming that plaintiff's mistaken filing was within the parameters of the case which have considered equitable tolling, the doctrine cannot be applied in the instant case because a second doctrine, that involving the application of Eleventh Amendment and sovereign immunity. It effectively denies this Court the jurisdiction to consider equitable tolling.

In Pennhurst State School & Hospital et al. v. Terri Lee Halderman, ___ U.S. ___, 52 L.W. 4155 (decided January 23, 1984), the United States Supreme Court recognized the continuing viability of the Eleventh Amendment

holding that the principle sovereign immunity of the states is a constitutional limitation on the federal judicial power established in Article III of the Constitution. As the Court noted at 4158:

> "The Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.' Ford Motor Co. v. Department of Transportation, 323 U.S. 459, 464 (1945). See e.g. In re Ayers, 123 U.S. 443,487-492 (1887); Louisiana v. Jumel, 107 U.S. 711, 720, 723, 727-728 (1882). Thus, '[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.' Hawaii v. Gordon, 373 U.S. 57, 58 (1963) (per curiam). And, as when the State itself is named as the defendant, a suit against the state officials that is in fact a suit against the State is barred regardless of whether it seeks damages or injunctive relief. See Cory v. White, 457 U.S. 85, 91 (1982)."

We note that while the Supreme Court has held that congress may, in effect, waive Eleventh Amendment and sovereign immunity on behalf of a state in Title VII cases (Fitzpatrick v. Bitzer, 427 U.S. 445

(1976)), waivers of immunity are to be strictly construed by the Courts. In this regard the immunity of the States is coextensive with that of the United States. As to the latter the Court is referred to Block v. North Dakota, etc., ___ U.S. ___, 103 S.Ct. 1811, 1819-1820 (1983) wherein the Supreme Court observed:

> "The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress. A necessary corollary of this rule is that when Congress attaches conditions to waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly imputed. [citations omitted.] When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity."

Congress did not expressly waive immunity as to states and state agencies in Title VII but the waiver is implied where the provisions of 41 U.S.C. § 2000 are by congressional action made applicable to

states as employers. See Fitzpatrick v. Bitzer, supra, at 447-448. Congress, however, did not provide for an equitable tolling of the 180-day limitations period contained in 42 U.S.C. § 2000e(5)e. In Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 392 (1982), the Supreme Court addressed the question "whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit in federal court or whether the waiver is subject to waiver or estoppel." The Court held "that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Id. at 393. Eleventh Amendment immunity and sovereign immunity, however, is not subject to waiver and estoppel. Nevada has not waived its Eleventh

Amendment immunity in federal courts. See NRS 41.031.

> In Block v. North Dakota, supra, the Supreme Court held that in the sovereign immunity context, the statute of limitations questions was jurisdictional. The sameresult is reached by a different path, that suggested by Pennhurst State School & Hospital v. Halderman, supra. The Court in rejecting federal jurisdiction over a pendent state-law claim noted that:
>
> "[P]endent jurisdiction is a judge-made doctrine inferred from the general language of Art. III. The question presented is whether this doctrine may be viewed as displacing the explicit limitation on federal jurisdiction contained in the Eleventh Amendment."

The Court held at 52 L.W. 4163-4164:

> "In sum, contrary to the view implicit in decisions such as Greene, supra, neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment."

Thus judge-made doctrines of expediency and efficiency while having a proper place in cases involving private litigants, have no application in cases against the State and its agencies. The Eighth Circuit

Court of Appeals reached an analogous result in Monark Boat Company v. National Labor Relations Board, 708 F.2d 1322 (1983) involving the 30-day limitation period under 5 U.S.C. § 504 (Supp.V. 1981) of the Equal Access to Justice Act, P.L. 96-481, Title II, 95 Stat. 2325. The Eighth Circuit Court of Appeals concluded at 1326 that "the Board's interpretation of the EAJA's thirty-day time limitation provision as a jurisdictional requirement is a reasonably defensible interpretation." The Court distinguished the appellant's characterization of the EAJA as a remedial statute:

> "[E]very waiver of sovereign immunity is remedial. Furthermore, Monark's reliance on Zipes v. Trans World Airlines, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed. 234 (1982) is misplaced. Zipes held that the time limit for filing charges with the EEOC under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-(e) is not jurisdictional. Id. at 393, 102 S.Ct. at 1132. Zipes, however, involved an action

> against a private employer, not the United States. Thus, no question of sovereign immunity was presented. It has been recognized that because of the doctrine of sovereign immunity, decisions involving Title VII suits against private employers are not necessarily applicable to suits against the United States. See Brown v. General Services Administration, 425 U.S. 820, 833, 96 S.Ct. 1961, 1968, 48 L.Ed. 2d 402 (1976)."

Thus, where a limitations period is established by Congress which involves a waiver of sovereign immunity or the State's Eleventh Amendment immunity, compliance with the time limits is jurisdictional. This is the teaching of Block v. North Dakota, supra, and Brown v. General Services Administration, 425 U.S. 820 (1976) cited in Monarch. Brown involved facts which are similar to the instant case and was brought pursuant to Title VII. Because the filing was not timely the federal defendants moved to dismiss for lack of subject matter jurisdiction. The District Court granted the motion and the Court of

Appeals and Supreme Court affirmed. The basis of the Supreme Court's decision was the "completeness and structural integrity" of the Title VII provisions which provided for "a careful blend of administrative and judicial enforcement powers." Id. at 832-833. The remedial scheme was designed "to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." Id. at 829. The Court observed in the context of the waiver of sovereign immunity that the "structure of the 1972 amendment itself fully confirms the conclusion that Congress intended it to be exclusive and pre-emptive." Id.

As Congress waived Nevada's Eleventh Amendment immunity and sovereign immunity by the 1972 amendment to Title VII, it did so with the same considerations with which it waived sovereign immunity on behalf of

the United States. The structure and integrity of the congressional scheme are not amenable to the exceptions that might otherwise be engrafted by the Courts in cases involving private employers. Equitable tolling, therefore, is not within the power of this Court to consider in this case.

Plaintiff did not file her charge with the EEOC until April 2, 1982, 245 days after she left State service. As the charge was not legally filed until 60 days after it had been referred to the Nevada Equal Rights Commission, it was not filed with the EEOC until 308 days after plaintiff's termination of State service. Therefore, the defendants' cross motion for summary judgment must be granted as a

matter of law.

DATED this 2nd day of March, 1984.

BRIAN McKAY
Attorney General
DON CHRISTENSEN
Deputy Attorney General

By: Harry W. Swainston
Harry W. Swainston
Deputy Attorney General

APPENDIX H

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

VIRIGINIA M. OLIVER,

Plaintiff, CV-R-83-75-ECR

vs. O R D E R

STATE OF NEVADA, et al., Filed: 9/13/84

Defendants.
_____/

Good cause appearing, IT IS HEREBY ORDERED that each party to this action shall have twenty (20) days from the date of this order to submit a supplemental memorandum of points and authorities with respect to how or whether the following cases should be considered by the Court in deciding the Defendant State of Nevada's motion for summary judgment:

1. Egelston v. State University College, 535 F.2d 752 (2d Cir. 1976);

2. Equal Employment Opportunity

Commission v. Delaware Trust Co., 416 F. Supp. 1040 (D. Del. 1976);

3. Equal Employment Opportunity Commission v. Nicholson File Co., 408 F. Supp. 229 (D. Conn. 1976);

4. Dickerson v. United States Steel Corp., 439 F.Supp. 55 (E.D. Pa. 1977), vacated on other grounds sub nom. Worthy v. United States Steel Corp., 616 F.2d 698 (3d Cir. 1980);

5. Malone v. North American Rockwell Corp., 457 F.2d 779 (9th Cir. 1972);

6. Morgan J. Washington Mfg. Co., 660 F.2d 710 (6th Cir. 1981).

Counsel may also cite other authority that is in their opinion relevant to the "equitable tolling" theory discussed in the cases mentioned above.

IT IS FURTHER HEREBY ORDERED that a party desiring to file a reply to an opposing party's supplemental memorandum

of points and authorities shall do so within fifteen (15) days from the date of service of the opposing party's supplemental memorandum.

DATED: September 13, 1983.

EDWARD C. REED
UNITED STATES DISTRICT JUDGE

APPENDIX I
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

COURT'S RULES OF PRACTICE
RULE 16

MOTIONS

(a) MOTIONS SHALL BE IN WRITING.
All motions, unless made during a hearing or trial, shall be made in writing.

(b) MEMORANDUM BY MOVING PARTY.
Upon any motion, the moving party shall serve and file with the motion papers a memorandum setting forth the points and authorities relied upon in support of the motion.

(c) RESPONSIVE MEMORANDUM.
An opposing party, unless otherwise ordered by the court, shall have 15 days after service of the moving party's points and authorities within which to serve and file a memorandum of points and authorities in opposition to the motion.

(d) REPLY MEMORANDUM.
The moving party, unless otherwise ordered by the court, shall have 10 days after service of the responsive memorandum to file a reply memorandum of points and authorities if he so desires.

(e) FAILURE TO FILE POINTS AND AUTHORITES.
A failure of a moving party to file a memorandum of points and authorities in support of the motion shall constitute a consent to the denial of the motion; a failure of an opposing party to any motion

shall constitute a consent to the granting of the motion.

(f) MOTIONS FOR SUMMARY JUDGMENT.

(1) Proposed Findings of Fact, Conclusions of Law and Summary Judgment.

There shall be served and filed with each motion for summary judgment proposed findings of fact and conclusions of law and proposed summary judgment. Such proposed findings shall state the material facts as to which the moving party contends there is no genuine issue.

(2) Statement of Issues of Material Fact.

On motions for summary judgment, each party shall file a concise statement setting forth each fact material to the dispostion of the motion which the party claims is or is not genuinely in issue, and citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other matter upon which he relies in making such statement.

(g) ORAL ARGUMENT.

Unless all parties waive oral argument, all motions for summary judgment shall be calendared for a hearing before this court decides the same. All other motions may, in the court's discretion, be considered and decided with or without a hearing, whether or not oral argument is requested.